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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 USI INSURANCE SERVICES NATIONAL,
9 INC., formerly known as WELLS FARGO
INSURANCE SERVICES USA, INC.,

10 Plaintiff,

11 v.

12 STANLEY OGDEN, *et al.*,

13 Defendants.
14

NO. C17-1394RSL

ORDER REGARDING MOTIONS
FOR SUMMARY JUDGMENT

15 This matter comes before the Court on “Plaintiff USI Insurance Services National, Inc.’s
16 Motion for Summary Judgment” (Dkt. # 70) and “Defendants’ Motion for Summary Judgment”
17 (Dkt. # 75). Plaintiff, the 2017 purchaser of Wells Fargo’s insurance services operations, sued
18 seven former Wells Fargo employees and their current employer, ABD Insurance and Financial
19 Services, Inc. The employees left Wells Fargo’s employ in 2016 and 2017 to take positions with
20 ABD. Plaintiff alleges that the employees breached their employment agreements and fiduciary
21 duties and that ABD tortiously interfered with the employment contracts and/or Wells Fargo’s
22 business expectancy.
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25 Summary judgment is appropriate when, viewing the facts in the light most favorable to
26 the nonmoving party, there is no genuine issue of material fact that would preclude the entry of
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28 ORDER REGARDING MOTIONS
FOR SUMMARY JUDGMENT - 1

1 judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial
2 responsibility of informing the district court of the basis for its motion” (Celotex Corp. v.
3 Catrett, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that
4 show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving
5 party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to
6 designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp., 477 U.S.
7 at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . .
8 and draw all reasonable inferences in that party’s favor.” Krechman v. County of Riverside, 723
9 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the jury genuine issues
10 regarding credibility, the weight of the evidence, and legitimate inferences, the “mere existence
11 of a scintilla of evidence in support of the non-moving party’s position will be insufficient” to
12 avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014);
13 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes whose resolution
14 would not affect the outcome of the suit are irrelevant to the consideration of a motion for
15 summary judgment. S. Cal. Darts Ass’n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014). In other
16 words, summary judgment should be granted where the nonmoving party fails to offer evidence
17 from which a reasonable jury could return a verdict in its favor. FreecycleSunnyvale v. Freecycle
18 Network, 626 F.3d 509, 514 (9th Cir. 2010).

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22 Having reviewed the memoranda, declarations, and exhibits submitted by the parties, and
23 having carefully analyzed the various contract provisions signed by the individual defendants
24 and the record evidence regarding their actions, the Court finds as follows:
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1 **A. Stanley Ogden**

2 In 1994, Mr. Ogden was a shareholder in a firm called Pettit-Morry Co. On April 1st of
3 that year, Pettit-Morry entered into a stock purchase agreement whereby Acordia, Inc.,
4 purchased all of Pettit-Morry's outstanding stock. As part of that transaction, Mr. Ogden signed
5 a covenant not to compete. Dkt. # 1-2 at 32-38.
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7 The provision of the agreement on which plaintiff relies for its breach of contract claims
8 precluded Mr. Ogden from encouraging other Pettit-Morry employees from leaving the
9 company, from making commercial use of expiration dates or other information disclosed by the
10 employer, and from "solicit[ing] the insurance business of, or participat[ing] directing or
11 indirectly in the handling of the insurance business of, contract[ing] with or attempt[ing] to
12 contract with any . . . person, firm or entity which has been a client or customer of" Pettit-Morry
13 for a period of three years after his employment with Pettit-Morry terminated. Dkt. # 1-2 at 33
14 (§ 1). Mr. Ogden points out that this non-compete is triggered by the termination of his
15 employment with "the Corporation," a defined term meaning Pettit-Morry, and that when the
16 parties intended provisions of the agreement to apply to more entities than just Pettit-Morry, they
17 so stated. See "Prohibition on Disclosure of Information, Etc." provision, Dkt. # 1-2 at 34 (§ 5).
18 Mr. Ogden therefore argues that the three-year window barring solicitation and the handling of
19 insurance business for former clients was triggered by the termination of his employment with
20 Pettit-Morry and expired in April 1997.
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22 Mr. Ogden acknowledges that the agreement also contains a provision allowing Pettit-
23 Morry to assign or transfer its rights under the covenant to a successor in connection with a
24 merger, sale, or transfer of the business. Dkt. # 1-2 at 35 (§ 8(a)). He argues, however, that
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1 (a) there is no evidence that the contract was actually assigned from Pettit-Morrey to Acordia (or,
2 for that matter, from Wells Fargo to plaintiff¹) and (b) even if the noncompete transferred to
3 Acordia in the merger, the covenant does not grant to a subsequent purchaser the power to
4 further assign its rights.
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6 USI has not provided any evidence of an assignment, instead conceding that “these
7 contracts were never ‘assigned.’” Dkt. # 109 at 4. It maintains, however, that it has the right to
8 enforce the covenant not to compete because the covenant passed to it “through an uninterrupted
9 line of corporate succession through a series of all-stock merger transactions.” Dkt. # 109 at 4-5.
10 Pursuant to RCW 23B.11.060(a) and (b), when a merger takes effect, the participating
11 corporations merge into a single surviving entity into which “[t]he title to all real estate and other
12 property owned by each corporation party to the merger is vested . . . without reversion or
13 impairment.” Thus, Pettit-Morrey’s property, including its contracts with its shareholders/
14 employees and every interest in those contracts, transferred to Acordia post-merger through
15 operation of law. Mr. Ogden has not identified any case that rejects this straightforward
16 construction of the merger statute, either in Washington or elsewhere. The only case the Court
17 found, Acordia of Ohio, LLC v. Fishel, 978 N.E.2d 814 (Ohio 2012), was reversed on
18 reconsideration at Acordia of Ohio, LLC v. Fishel, 978 N.E.2d 823, 826 (Ohio 2012). The
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22 ¹ The Court has considered the Declaration of Michael Seyfried solely for the purpose of
23 confirming the corporate transactions and relationships at issue. Whether his untimely disclosure as a
24 witness was justified or harmless has not been determined. For purposes of the pending motions, the
25 Court assumes that Acordia’s parent company, ACO Brokerage Holdings Corp., was purchased by
26 Wells Fargo & Co. in 2001. The insurance business continued to operate as Acordia until 2007, when
27 Wells Fargo & Co. changed its name to Wells Fargo Insurance Services USA, Inc. Under this scenario,
28 Acordia retained its separate existence and whatever rights it had under the non-compete through the
name change.

1 Supreme Court of Ohio ultimately held that “[t]he merged company has the ability to enforce
2 noncompete agreements as if the resulting company had stepped into the shoes of the absorbed
3 company” even in the absence of any “successors or assigns” language in the noncompete
4 agreement. See also Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990); First Fin.
5 Bank, N.A. v. Bauknecht, 71 F. Supp.3d 819, 833 (C.D. Ill. 2014); HD Supply Facilities Maint.,
6 Ltd. v. Bymoen, 210 P.3d 183, 187 (Nev. 2009). In light of RCW 23B.11.060’s broad transfer of
7 all property postmerger, the Court finds that Acordia succeeded to Pettit-Morry’s interests,
8 rights, and liabilities under the covenant not to compete, essentially stepping into “the
9 Corporation” role. One of the rights to which it succeeded was the right to assign or transfer the
10 contract in connection with a merger, sale, or other disposition of the insurance business. Its
11 subsequent merger with USI therefore effected another transfer of the contract by operation of
12 law, with or without an express assignment of the contract.

15 Mr. Ogden further argues that the noncompete agreement is non-transferrable because it
16 is a personal services contract. A basic tenet of commercial law is that all contracts are
17 assignable unless such assignment is expressly prohibited by statute, contract, or is in
18 contravention of public policy. Berschauer/Phillips Const. Co. v. Seattle Sch. Dist. No. 1, 124
19 Wn.2d 816, 829 (1994); Puget Sound Nat. Bank v. State Dep’t of Revenue, 123 Wn.2d 284, 288
20 (1994). In Washington, courts have found that contracts for personal service are an exception to
21 the general rule in favor of assignability. Because a contract that depends on the integrity,
22 qualifications, or skill of a particular individual for performance would be materially impaired if
23 performed by another, such contracts are not assignable without the consent of the party to
24 whom performance is owed. Panhandle Lumber Co. v. Mackay, 21 F.2d 916, 917 (9th Cir.

1 1927); Fin. Servs. of Puget Sound, Inc. v. Phenneger & Morgan, Inc., 98 Wn. App. 1018, 1999
2 WL 1081267 at *4 (1999).

3 There are a number of reasons why the personal services argument is unpersuasive. First,
4 the agreement signed in 1994 is not an employment contract and does not obligate Mr. Ogden to
5 provide any services - personal or otherwise - to Pettit-Morry or Acordia. Rather, Mr. Ogden
6 simply agreed to abstain from certain activities following the termination of his employment.
7 Second, even if a covenant not to sue could be considered a promise to perform personal
8 services, defendant provides no authority for the proposition that the judge-made equitable rule
9 against unconsented assignment of such contracts would trump RCW 23B.11.060's automatic
10 transfer of all property owned by the merging entities. Third, the transfer at issue here does not
11 impinge on the interests the personal service contract exception is meant to protect. The
12 exception applies when the parties intend to have a particular, designated person perform the
13 contractual undertakings: those duties may not be assigned to another, performed by employees,
14 or performed by the promisor's personal representative upon his or her death. See MacDonald v.
15 O'Shea, 58 Wash. 169, 171-73 (1910). In order to protect the expectations of the parties, an
16 employment contract engaging a particular person with the requisite qualifications, skills, and
17 dedication cannot simply be assigned to a stranger for the performance of the employment
18 duties. The assignment of the right to receive the benefits of performance, however, may in some
19 instances occur without an adverse impact on the expectations of the performing party: that is
20 not always the case, but Mr. Ogden has not shown that he had a specific interest in contracting
21 with Pettit-Morry rather than its successor. Finally, in the circumstances presented here, all
22 parties to the covenant not to compete explicitly consented to its transfer in connection with a
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1 merger. Dkt. # 1-2 at 35 (¶ 8(a)). Thus, the parties recognized that Pettit-Morry's rights and
2 liabilities under the contract could be assigned.

3 The Court finds that USI, through an unbroken series of corporate mergers, is entitled to
4 enforce the noncompete signed in 1994. The next issue is whether Mr. Ogden breached those
5 limitations. As noted above, Mr. Ogden promised not to encourage other employees to leave the
6 company, not to utilize "expirations and other information disclosed" by the employer for
7 commercial purposes, not to solicit or participate in the handling of insurance business of any
8 client or customer of his employer, and not to contract or attempt to contract with any client or
9 customer. Mr. Ogden acknowledged during his deposition that, starting immediately upon his
10 hiring with ABD, he continued handling insurance business for a number of former Wells Fargo
11 clients. Dkt. # 71-1 at 28-31. Plaintiff has therefore established a breach of the 1994 agreement
12 regardless of whether plaintiff can prove that Mr. Ogden "encouraged" other employees to leave
13 Wells Fargo or whether a broad prohibition on the use of "information" is enforceable.²
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16 **B. Eleanor "Sam" O'Keefe**

17 Ms. O'Keefe, like Mr. Ogden, signed a covenant not to compete as part of the merger
18 between Pettit-Morry and Acordia. Dkt. # 1-2 at 40-46. For the reasons stated above, USI is
19 entitled to enforce the agreement. Like Mr. Ogden, Ms. O'Keefe admitted at deposition that she
20 continued to handle the insurance business of former Wells Fargo clients on behalf of ABD. Dkt.
21 # 71-1 at 56-59. Plaintiff has therefore established a breach of the 1994 agreement.
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25 ² The Court finds that, given the circumstances surrounding the contract's execution and the
26 nature of the employment relationship at issue, the promise not to do work for former clients for a three
27 year period is reasonable.

1 **C. Lewis Dorrington**

2 Mr. Dorrington began working for a predecessor of USI in 2004, at which point he signed
3 an employment agreement. Dkt. # 1-2 at 48-50. Mr. Dorrington generally agreed that he was
4 being fully and fairly remunerated for his services and that it would be “unfair and inequitable”
5 for him, upon termination of his employment, “to take, as a result of his employment, accounts
6 belonging properly to Employer.” Dkt. # 1-2 at 49 (¶ F.1.). Of relevance here, he specifically
7 agreed that he would not:
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- 9 • divulge the names, addresses, or other information of the employer’s customers
10 for a period of three years following the termination of his employment; or
11 • call on, solicit, or take away (or attempt to call on, solicit, or take away) any of
12 the employer’s customers with whom he became acquainted during his
13 employment for a period of three years following the termination of his
14 employment unless those customers had conducted no business with the
15 employer for twelve months.
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17 Dkt. # 1-2 at 49 (¶ F.3.).³
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20 ³ The Court finds that the other two provisions on which USI relies for its breach of contract
21 claim against Mr. Dorrington, F.2. and F.4., are inapplicable because they apply only “following
22 termination of his employment by Employer.” USI unconvincingly argues that “by employer” modifies
23 “employment,” not “termination” in this phrase. Where that is the intended meaning, the agreement uses
24 the phrase “following the termination of his employment with Employer” See Dkt. # 1-2 at 49
25 (¶ F.3.) In the alternative, USI argues that it makes no sense to impose restrictive covenants when the
26 employer has terminated the employment but not when an employee has taken the initiative to end the
27 relationship. Whatever the logic or reason behind the words chosen, they are unambiguous and cannot
28 be reformed absent a clear, cogent, and convincing showing of mutual mistake, a scrivener’s error, or
unilateral mistake together with inequitable conduct. See Berg v. Ting, 125 Wn.2d 544, 553-54 (1995);
Davis v. Liberty Mut. Group, 814 F. Supp.2d 1111, 1117 (W.D. Wash. 2011). No such showing has
been made here.

1 Plaintiff has not raised a genuine issue of fact regarding a breach of the restrictive
2 covenants binding Mr. Dorrington. Paragraph F.3(b) uses active verbs, namely “call on, solicit,
3 or take away,” to describe the forbidden conduct. When read with ¶ F.4., it is clear that merely
4 being the recipient of business transferred at the request of the customer is not prohibited by
5 ¶ F.3. Quoting approvingly a “rough definition” formulated by the California Supreme Court, the
6 Washington Supreme Court has stated that “[s]olicit means: To appeal to (for something); to
7 apply to for obtaining something; to ask earnestly; to ask for the purpose of receiving. By
8 contrast, merely informing customers of one’s former employer of a change in employment,
9 without more, is not solicitation.” Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 440 n.4
10 (1999) (quoting Aetna Bldg. Maint. Co. v. West, 246 P.2d 11, 15 (Cal. 1952)) (internal quotation
11 marks and alterations omitted).⁴ Mr. Dorrington did not send out change of employment
12 notifications in this case: the evidence in the record shows that he did no more than update his
13 LinkedIn page to reflect a change of employment. There is no indication that he used
14 confidential client information to do so, that he initiated contact with any former clients, or that
15 he otherwise divulged client identities to ABD (as opposed to the clients revealing themselves).
16 Mr. Dorrington’s former clients reached out to him to inquire where he had gone and/or how
17 they could transfer their business to ABD so that he could continue servicing their accounts. No
18 reasonable jury could, under Washington law, find that responding to such inquiries constitutes
19 divulging, calling on, soliciting, or taking away former clients for purposes of ¶ F.3.

23 **D. Mary Mark**

24 Ms. Mark’s employment agreement with USI’s predecessor is similar to that of Mr.
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26 ⁴ USI’s list of cases applying non-Washington law is unpersuasive. Dkt. # 109 at 21.

1 Dorrington with the notable exception that the notice and liquidated damages provisions of ¶ F.2.
2 and ¶ F.4. apply during specified periods “following termination of employment with [USI’s
3 predecessor].” Ms. Mark therefore has potential liability under not only ¶ F.3., but under ¶ F.2.
4 and ¶ F.4 as well. Plaintiff has not, however, provided evidence that could support a finding that
5 Ms. Mark engaged in any of the forbidden acts or that any USI account followed Ms. Mark to
6 ABD after she resigned. The evidence submitted shows only that Ms. Mark resigned from Wells
7 Fargo on July 29, 2016 (Dkt. # 71-1 at 184) and was hired by ABD as a Sr. Account Manager
8 reporting to defendant John Haskell (Dkt. # 71-1 at 178).
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10 **E. Cory Anderson**

11 Mr. Anderson signed an “Employment Agreement and Covenant Not to Compete” with
12 Acordia Northwest, Inc., in October 1999. Dkt. # 27-6. The agreement set forth the terms and
13 conditions of his employment as an account executive and imposed certain restrictions on Mr.
14 Anderson’s use of Acordia’s customer lists and post-termination activities. Of relevance here,
15 the agreement:
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- 17 ● required that Mr. Anderson use customer lists only as necessary in the course of
18 his employment with Acordia and return them upon termination of his
19 employment;
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- 21 ● precluded Mr. Anderson from encouraging any agent of Acordia from leaving
22 its employ, making commercial use of information disclosed by Acordia
23 during his employment, or soliciting or handling the insurance business of
24 Acordia’s customers for a period of three years from the termination of his
25 employment with Acordia; and
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- provided for the payment of liquidated damages if Mr. Anderson made commercial use of Acordia's information and/or handled the insurance business of Acordia's customer following the termination of the employment relationship.

Dkt. # 27-6 at ¶¶ 5-7. The parties agreed that "Employee's services [under the agreement] are personal" and his duties "may not be assigned or delegated" except that he could assign his rights to payment of amounts due and owing from the employer. Dkt. # 27-6 at ¶ 14.

Mr. Anderson argues that the contract was not assigned to USI and it therefore lacks authority to enforce the confidentiality and noncompete provisions. Although this contract contains both employment (*i.e.*, personal service) components and restrictive covenants and does not contain an explicit consent to assignment in connection with a merger, this argument nonetheless fails for the other reasons stated above with regards to Mr. Ogden's contract.

Mr. Anderson also argues that USI is barred from asserting a breach of contract claim because its predecessor, Wells Fargo, materially breached its terms when it unilaterally reduced Mr. Anderson's compensation. "A breach or non-performance of a promise by one party to a bilateral contract, so material as to justify a refusal of the other party to perform a contractual duty, discharges that duty." Jacks v. Blazer, 39 Wn.2d 277, 285 (1951) (quoting Restatement (First) of Contracts § 397 (1932)). USI's predecessor agreed to pay Mr. Anderson an initial annual salary of \$50,000 and make upward semi-annual adjustments "based on 30% of the trailing twelve months' commission on existing business and 35% of the trailing twelve months' new business." Dkt. # 27-6 at ¶ 3. The salary agreement was to remain in effect for five years, at the end of which time "it will be revised upon agreement of Employer and Employee." Id. In

1 2010 and 2012, Wells Fargo presented, and Mr. Anderson signed, a new commission plan that
2 reduced commissions on renewals from 30% to 25%. Dkt. # 110-1 at 2-3. These agreements
3 specified that commissions would be paid on all revenue earned: there was no account threshold
4 amount under which commissions were not paid. In addition, as was the case in Culbertson v.
5 Wells Fargo Ins. Servs. USA, Inc., 191 Wn. App. 1004, 2015 WL 6696969, at *1 (2015), “[i]n
6 exchange for signing the agreement, Wells Fargo agreed to pay an increased commission [on
7 new revenue] for one year.” At some point after 2012, Wells Fargo announced that it would no
8 longer pay commissions on smaller accounts. Many of Mr. Anderson’s clients paid total
9 premiums that were less than the ever-increasing threshold for the payment of commissions.
10 There is no indication in the record that this announcement was reduced to writing, accepted by
11 Mr. Anderson, or accompanied by consideration. By the end of 2016, Wells Fargo had stopped
12 paying any commissions on a significant number of Mr. Anderson’s accounts, much less the
13 30% commission promised in the 1999 agreement or the 25% commission promised in 2010 and
14 2012.

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17 USI argues that Wells Fargo was entitled to unilaterally change the terms of the parties’
18 employment agreement under Washington law because (a) the 1999 promises related to salary
19 expired by their terms in 2004 and (b) the employment relationship was at-will. Neither
20 argument is persuasive given the facts of this case. Even if the Court were to assume that the
21 employment agreement (or some discrete portion thereof) remained in effect for only five years
22 and, when the parties failed to mutually agree to revised terms, expired in 2004 (Dkt. # 27-6 at
23 ¶ 3), the parties entered into subsequent written agreements in 2010 and 2012 (Dkt. # 110-1 at 2-
24 3). These agreements contained mutual promises, were supported by consideration, and were
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1 signed by both parties. These new compensation promises were valid and enforceable.

2 With regards to the at-will employment argument, Duncan v. Alaska USA Fed. Cred. U.,
3 148 Wn. App. 52 (2008), the seminal case on modifications of the terms of at-will employment,
4 does not support the blanket rule USI urges. The Duncan court determined that an employer
5 could unilaterally modify a unilateral contract. In that case, the defendant credit union created a
6 new lending program in Washington and developed a written summary of the compensation
7 package for the newly-created Credit Development Officer position. The package was presented
8 to Duncan, who accepted the new position. He was surprisingly successful in the role, and
9 payments under the compensation package exceeded \$430,000 in the first year of the program.
10 The credit union significantly reduced the compensation package in year two. The court of
11 appeals found that the unilateral change was enforceable because the original plan was not a
12 bilateral agreement. There was no evidence of an exchange of reciprocal promises in the original
13 compensation plan: rather, the employer provided information regarding how the new position
14 would be compensated and Duncan performed the responsibilities of the position when it was
15 offered to him. Id. at 74.⁵ In contrast, where the employment relationship is governed by a
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20 ⁵ “A unilateral contract consists of a promise on the part of the offeror and performance of the
21 requisite terms by the offeree. . . . The essential distinction between a unilateral contract and a bilateral
22 contract is the method of acceptance. In a unilateral contract . . . the offer or promise of the one party
23 does not become binding or enforceable until there is performance by the other party, whereas, [in a
24 bilateral contract], it is not performance which makes the contract binding, but rather the giving of a
25 promise by one party for the promise of the other. . . . In other words, under a unilateral contract, an
26 offer cannot be accepted by promising to perform; rather, the offeree must accept, if at all, by
27 performance, and the contract then becomes executed.” Multicare Med. Ctr. v. Dep’t of Soc. and Health
28 Servs., 114 Wn.2d 572, 583-84 (1990), superceded by statute on other grounds as stated in Neah Bay
Chamber of Commerce v. Dep’t of Fisheries, 119 Wn.2d 464, 469 (1992) (internal formatting, citations,
and footnotes omitted, alteration in original). See also Storti v. Univ. of Wash., 181 Wn.2d 28, 36 (2014)
(identifying employee handbook provisions as an example of a unilateral contract between employers
and employees).

1 bilateral contract, the court recognized that mutual assent to a proposed change is necessary. Id.
2 at 74-75 (summarizing Ebling v. Gove's Cove, Inc., 34 Wn. App. 495 (1983)).

3 In this case, the parties entered into a series of written contracts through 2012 in which
4 they exchanged promises, provided consideration, and manifested their assent. Under the
5 parlance of Duncan and other Washington cases, these contracts were bilateral. A bilateral
6 contract is subject to modification arising out of the intentions of the parties and a meeting of the
7 minds, but the modification must involve a mutual change of rights or obligations
8 (consideration) and mutual assent. Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 27-28
9 (2005). One may not unilaterally modify a bilateral contract. Id. at 28; Ebling, 34 Wn. App. at
10 499. Because there is no evidence that Wells Fargo provided consideration for the adverse
11 changes in the way commissions were calculated after 2012 or that Mr. Anderson assented to
12 that changes, the modifications were invalid and unenforceable.⁶ USI does not dispute that its
13 predecessor breached its promises to pay 25% commissions on renewals with no account
14 threshold or that this breach was material. Mr. Anderson was therefore justified in refusing to
15 perform his obligations under the employment contracts.

18 **F. John Haskell**

19 Mr. Haskell argues that changes to his employment agreement in 2013 and 2015 lacked
20 consideration and are therefore unenforceable. Consideration is “any act, forbearance, creation,
21 modification or destruction of a legal relationship, or return promise given in exchange” for a
22 contract modification. King v. Riveland, 125 Wn.2d 500, 505 (1994). The exchanged
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25 ⁶ The at-will nature of Mr. Anderson’s employment relationship does not, standing alone, alter
26 this analysis. As discussed in Duncan, the rule that at-will contracts may be unilaterally modified applies
27 only when the contract itself was unilateral. 148 Wn. App. at 73.

1 performances or promises need not be of comparative value, they just must be legally sufficient
2 to support the obligations. Browning v. Johnson, 70 Wn.2d 145, 147 (1967). In the context of
3 restrictive covenants, the general rule is that consideration exists for a noncompete or
4 nonsolicitation agreement if it is negotiated when the employee is first hired: courts are willing
5 to presume that a promise to share confidential information is exchanged for the promise not to
6 take away co-workers or customers when the employment relationship ends. See Wood v. May,
7 73 Wn.2d 307, 310 (1968). A restrictive covenant introduced in the midst of employment,
8 however, must be supported by some consideration other than simply continued employment.
9 Absent a change in position or responsibility, the employee already has access to the employer's
10 confidential information, and if limits are now to be placed on the employee's post-employment
11 actions, the employer must make an exchange promise or performance. "There is no
12 consideration when one party is to perform some additional obligation while the other party is
13 simply to perform that which he promised in the original contract. Independent consideration
14 may include increased wages, a promotion, a bonus, a fixed term of employment, or perhaps
15 access to protected information . . . [and] involves new promises or obligations previously not
16 required of the parties." Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 834 (2004).

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20 USI, as the party asserting a breach of contract claim, has the burden of showing the
21 existence of a valid contract between the parties. Karpenski v. Am. Gen. Life Companies, LLC,
22 999 F. Supp.2d 1235, 1250 (W.D. Wash. 2014). USI argues that the 2015 contract is valid
23 because, in exchange for Mr. Haskell's agreement not to solicit co-workers or customers for two
24 years following the termination of his employment, he was reassigned to a Senior Sales
25 Executive - Commercial Insurance position and his compensation package was changed to
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1 include commissions. The non-solicitation provision was not, however, new in 2015, so the
2 Court need not determine whether a demotion from Managing Director to Sales Executive and a
3 cut in base pay satisfies the “additional obligation” requirement.

4 The non-solicitation provision USI seeks to enforce was introduced in January 2013 when
5 Mr. Haskell first signed the Wells Fargo Agreement Regarding Trade Secrets, Confidential
6 Information, Non-Solicitation, and Assignment of Inventions. Dkt. # 76-8 at 13-15. The
7 agreement expands the temporal and substantive scope of the solicitation restrictions that were
8 imposed when Mr. Haskell started working for USI’s predecessor. The evidence regarding
9 whether any of the other terms and conditions of employment were contemporaneously adjusted
10 in exchange for the new obligations Mr. Haskell undertook is surprisingly limited. USI asserts
11 that Mr. Haskell was promoted “from Managing Director of the regional Property & Casualty
12 Group to Managing Director of the *entire* Northwest region,” citing Mr. Haskell’s deposition
13 testimony as support. Dkt. # 109 at 14 (emphasis in original). No corporate documentation of a
14 title change or its effects are provided. Mr. Haskell, however, confirms that he signed the 2013
15 agreement when he became the managing director of a region including seven or eight offices.
16 Dkt. # 71-1 at 112. The Court will not attempt to evaluate the adequacy of the consideration
17 provided. If, as appears to be the case, Wells Fargo promoted Mr. Haskell to a position of greater
18 responsibility and with greater access to its confidential information in 2013, that promise is
19 consideration for an expanded non-solicitation provision.

20 Mr. Haskell’s 2013 and 2015 employment contracts required, in relevant part, that:

- 21 ● he keep the names, addresses, contact, financial, and account information of
- 22 Wells Fargo’s client confidential; and

- he not “solicit, recruit or promote the solicitation or recruitment of” any Wells Fargo employee or “solicit, participate in or promote the solicitation of” any Wells Fargo customer for a period of two years from the termination of his employment with Wells Fargo.

Dkt. # 76-8 at 8. The Court finds these provisions reasonable given the nature of the insurance industry and circumstances in which they were negotiated.

Plaintiff has not raised a genuine issue of fact regarding a breach of the confidentiality or solicitation-of-client provisions binding Mr. Haskell. The evidence in the record shows that Mr. Haskell, like Mr. Dorrington, simply updated LinkedIn to reflect his change of employment: he did not send notices or any other kind of communication to the clients he had left behind at Wells Fargo. Dkt. # 71-1 at 111. There is no indication that Mr. Haskell used client information to update his on-line profile or otherwise used Wells Fargo’s confidential client data. Nor is there any indication that Mr. Haskell appealed to his former clients for the transfer of their business or assisted ABD in such solicitation. No reasonable jury could find that Mr. Haskell solicited, participated in solicitation, or promoted the solicitation of Wells Fargo customers.

Mr. Haskell’s communications with Wells Fargo employees after he left the company, however, fall within the prohibition against “promot[ing] the solicitation or recruitment of” his former co-workers. Although there is no indication that Mr. Haskell initiated these communications or directly asked his former co-workers to join him at ABD, he put them in touch with individuals at ABD who could answer their questions and ultimately recruited them to ABD. He therefore promoted the recruitment of Wells Fargo employees in violation of the 2013 and 2015 agreements.

1 **G. Marcia Ogden**

2 Ms. Ogden did not sign a confidentiality, noncompete, or non-solicitation agreement with
3 USI or its predecessors. In the absence of any such agreement, there can be no breach.
4

5 **H. Breach of Common Law Duties**

6 Under Washington common law, “an employee has a duty to refrain from soliciting
7 customers for a rival business or to act in direct competition with his or her employer’s business”
8 during the period of employment. Evergreen Moneysource Mortg. Co. v. Shannon, 167 Wn.
9 App. 242, 251 (2012) (citing Restatement (Second) of Agency § 393 cmt. e (1958)). In addition,
10 where a confidential relationship exists between the employee and the employer, the employee
11 may “not use confidential information of his or her former employer’s customers to actively
12 solicit their business.” Ed Nowogroski Ins., 137 Wn.2d at 444.
13

14 Plaintiff does not allege that any of the defendants solicited Wells Fargo customers on
15 behalf of ABD or competed against Wells Fargo while still employed by Wells Fargo. Rather,
16 plaintiff points to evidence that Mr. and Ms. Ogden planned and coordinated their departure
17 from Wells Fargo together⁷ and that Mr. Ogden told Ms. O’Keefe that he was planning to leave,
18 a conversation that occurred about a week before his departure from Wells Fargo. This conduct
19 does not appear to breach any duty imposed at common law. Plaintiff has also presented
20 evidence that Mr. Ogden disclosed the names of some of the larger accounts he was handling for
21 Wells Fargo when he met with ABD prior to his departure from Wells Fargo.⁸ If plaintiff can
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24 ⁷ Defendants’ spousal privilege arguments are rejected. Any privilege that may have shielded
25 testimony regarding the couple’s conversations has been waived.

26 ⁸ Contrary to plaintiff’s bald assertion, Ms. O’Keefe’s deposition testimony was that she did not
27 disclose any client names when speaking with ABD. Dkt. # 71-1 at 53.

1 show that this information was confidential and that Mr. Ogden disclosed it in order to solicit
2 business, it may succeed on its breach of duty claim. It is not, however, entitled to judgment as a
3 matter of law based on the limited record provided.

4
5 **I. ABD Insurance and Financial Services, Inc.**

6 The parties generally agree that the success of plaintiff's claim against ABD for tortious
7 interference follows the success of its breach of contract and breach of duty claims.

8 **J. Damages**

9 Plaintiff argues that proof of damages in this case "indisputably requires expert opinion
10 testimony" and that "[l]ay opinion testimony on this subject is inadmissible." Dkt. # 70 at 23.
11 Plaintiff misstates the law. The case it cites for this startling proposition makes clear that, while
12 expert testimony may play a role in providing a reasonable method for calculating damages, it is
13 not the only way to prove either the fact or the amount of damage. Alpine Indus., Inc. v. Gohl,
14 30 Wn. App. 750, 754-55 (1981) (noting that "[e]xpert testimony as to the amount of lost profits
15 is admissible and may be sufficient to support a jury verdict" and acknowledging the substantial
16 lay witness testimony admitted at trial). Alpine Industries rests heavily on Larsen v. Walton
17 Plywood Co., 65 Wn.2d 1, 19-20 (1964), in which the state Supreme Court rejected the
18 conclusions of plaintiff's experts as "based upon hypothesis" in favor of evidence regarding
19 plaintiff's actual profit experience.

20 The expert reports provided by plaintiff are very general. Mr. Nickerson, the economist,
21 relies almost exclusively on Mr. Tilden's opinions regarding the insurance industry and facts
22 regarding net revenue and annual loss percentages provided by USI. Dkt. # 71-1 at 207-09. Mr.
23 Nickerson compared the 2016-2017 revenue data with the numbers for the following year to
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1 calculate lost profits of \$13,243,185. Mr. Tilden, for his part, does not rely on Wells Fargo's
2 actual customer retention rates (either overall or in specialty markets), Wells Fargo's retention
3 success when a producer relocates to another agency, or Wells Fargo's actual personnel
4 capabilities, instead relying on the "Best Practices Study Update" and his own experiences in the
5 insurance industry. Dkt. # 71-1 at 191-94. In coming to his conclusions regarding the retention
6 rate Wells Fargo would have had if defendants had honored their restrictive covenants, Mr.
7 Tilden assumed that all of the defendants were barred from making contact with their former
8 clients or otherwise notifying them of their change of employment.

10 Some of these assumptions are not supported by the existing record. Others are disputed.
11 For purposes of this motion, the Court notes that the lump sum calculation of lost profits makes
12 it impossible to allocate damages to those defendants who actually breached an enforceable
13 restrictive covenant or duty. Even if the fact of damage arising from Mr. Ogden, Ms. O'Keefe,
14 and Mr. Haskell's breaches is not seriously in dispute, plaintiff has not provided "reasonably
15 convincing evidence indicating the amount of damages" associated with those breaches.

16
17 Gaasland Co. v. Hyak Lumber & Millwork, Inc., 42 Wn.2d 705, 712 (1953).⁹

18 **K. Attorney's Fees**

19
20 Defendants make no effort to support their one-sentence request for an award of
21 attorney's fees. Plaintiff, for its part, has not yet established damages associated with any of the
22 breaches discussed above: its request for an award of fees is therefore premature.

24
25 ⁹ The Court has considered the Declaration of Sarah Darragh in the context of this motion, but
26 notes that her assertion that plaintiff has received no compensation related to accounts that transferred
27 with defendants to ABD is disputed. Whether her untimely disclosure as a witness was justified or
28 harmless has not been determined.

1 For all of the foregoing reasons, the motions for summary judgment (Dkt. # 70 and # 75)
2 are GRANTED in part and DENIED in part. As a matter of law:


- 3 ● USI is entitled to enforce the 1994 agreements Mr. Ogden and Ms. O’Keefe signed and
4 has established a breach of those agreements when Mr. Ogden and Ms. O’Keefe
5 continued handling the insurance business of Wells Fargo clients after they began
6 working for ABD;
- 7 ● Neither Mr. Dorrington nor Ms. Mark breached the restrictive covenants they signed in
8 2004 and 2005, respectively;
- 9 ● Although USI would otherwise be entitled to enforce the restrictive covenants Mr.
10 Anderson signed in 1999, its predecessor materially breached the employment
11 contract, justifying Mr. Anderson’s refusal to perform and discharging his duty to
12 do so;
- 13 ● Consideration existed for the expansion of the restrictive covenants binding Mr.
14 Haskell, and he breached the agreement when he promoted the recruitment of his
15 former co-workers;
- 16 ● Ms. Ogden is not bound by and has not breached any restrictive covenants; and
- 17 ● ABD tortiously interfered with plaintiff’s contractual expectations when Mr. Ogden
18 and Ms. O’Keefe continued handling insurance business of Wells Fargo clients
19 and when Mr. Haskell assisted ABD in recruiting his former co-workers.
20

21 The parties are encouraged to resume or restart settlement negotiations. If the parties agree that
22 the assistance of a federal judicial officer would be of material assistance in their negotiations,
23 they should contact the Court’s judicial assistant, Teri Roberts, at 206-370-8810. If negotiations
24

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1 fail, the parties shall notify the Court and indicate whether the previously-filed motions in limine
2 need to be resolved (or will be withdrawn and refiled) and when the case will be ready for trial.
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4 Dated this 6th day of March, 2019.

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6 Robert S. Lasnik
7 United States District Judge
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